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No. 88-1642

In The

Supreme Court of the United States

October Term, 1988

STATE OF ALASKA,

Petitioner,

v.

KENAITZE INDIAN TRIBE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Did the Secretary of Interior correctly refrain from displacing the State of Alaska's traditional role as manager of fish and game on federal lands (approximately 60% of Alaska), in that the definition of "rural area" contained in the state's comprehensive subsistence law is consistent with the use of the term "rural" in 16 U.S.C. § 3113 in the federal subsistence law?

Should the Secretary instead effecuate a management take-over, which would result in patchwork responsibility for Alaska's valuable, vulnerable, and in many cases migratory fish and game resources?

Is the term "rural" a relative one, varying with the context of its use, such that in determining its meaning in 16 U.S.C. § 3113 the lower court should have

(a) considered legislative history which reveals that Alaska's definition is consistent with underlying Congressional intent,

(b) deferred to the Secretary's express determination that Alaska's definition is consistent with the federal law, and

(c) refrained from relying on a superficial description in a tourist guidebook, outside of the record, in concluding that the Kenai Peninsula is "rural" within the "plain meaning" of that term?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The State of Alaska respectfully petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The ninth circuit opinion is reported at 860 F.2d 312 (Appendix A, App. A-1). The memorandum and order of the United States District Court for the District of Alaska is unpublished (Appendix B, App. B-1).

JURISDICTION

The ninth circuit on October 24, 1988, issued an opinion reversing the district court's holding that Alaska's subsistence law was consistent with the federal subsistence law. The State of Alaska filed a petition for rehearing, and on January 4, 1989, the ninth circuit issued an order and an amended opinion denying the petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Alaska National Interest Lands Conservation Act, Title VIII, ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371, § 803, 16 U.S.C. § 3113 (1980), provides in relevant part that "subsistence uses" means "the customary and traditional uses *by rural Alaska residents* of wild, renewable resources for direct personal or family consumption" for specified purposes, including food, shelter, fuel, clothing, tools, transportation, handicrafts made of nonedible by-products, barter, sharing, and customary trade. (Emphasis added.)[1]

Alaska Statute ("AS") 16.05.940(30) provides in relevant part that "subsistence uses" means "the noncommercial, customary and traditional uses of wild renewable resources *by a resident domiciled in a rural area of the state*" for substantially the same purposes as those listed in 16 U.S.C. § 3113, described above. (Emphasis added.)

[1] Hereinafter, ANILCA provisions are cited by reference to 16 U.S.C. section number.

AS 16.05.940(25) defines "rural area" as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area."

STATEMENT OF THE CASE

Alaska – perhaps no longer the "last frontier" – has been wracked by change, tied in large part to massive oil development, including oil fields adjacent to the Kenai Peninsula, the locus of this case. The state and Congress both recognized that sweeping economic changes and the accompanying population boom jeopardized the way of life in remote parts of the state where hunting and fishing are still far more important than cash-related activities. Such isolated areas have neither many jobs nor many grocery stores.

As a consequence of the growing competition for wildlife, Alaska (in 1978) and Congress (in 1980) both enacted laws giving subsistence uses a priority over other hunting and fishing. The state has managed fish and game on all lands in Alaska since statehood, and the federal law provides that it continue to do so if Alaska's subsistence law mirrors the federal law.

The Secretary of Interior ("Secretary") decided that the two laws are consistent, and that thus the inexperienced, underfunded, and unprepared federal agencies need not replace Alaska's management, which is founded on three decades of experience. The ninth circuit disregarded his finding entirely, and also refused to

examine legislative history abundantly demonstrating the consistency. As a result, Alaska's fish and game may be endangered by a difficult and potentially devastating patchwork of state and federal management, and Congress' intent will be thwarted.

* * *

In 1980, Congress required the Secretary to take over management of fishing and hunting on federal public lands (comprising about 60% of Alaska) to provide for subsistence uses, unless Alaska chooses to define and protect those uses in a manner consistent with ANILCA. 16 U.S.C. § 3115(d). Under ANILCA, "subsistence uses" are the "customary and traditional uses by rural Alaska residents" of fish and game for specified purposes, and are entitled to a priority over other uses. 16 U.S.C. § 3113; 16 U.S.C. § 3114.

Earlier, in 1971, Congress had extinguished all aboriginal hunting and fishing rights in Alaska in exchange for 46 million acres and $962.5 million transferred to Alaska's Native people. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971), Sections 4(b) and 6(a). Thus, any federal rights to subsistence hunting and fishing in Alaska, including any which plaintiff might argue for, stem directly from the federal statutory scheme, and are available equally to Native and non-Native Alaskans, based on residence in remote areas highly reliant on fish and game.

In enacting ANILCA, Congress found that "the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives," is "essential" to their "physical," "economic,"

"traditional," "cultural," and "social existence." 16 U.S.C. § 3111. This is because, in part, "the situation in Alaska is unique in that . . . no practical alternative means are available to replace the food supplies . . . from fish and wildlife which supply rural residents dependent" on subsistence uses. *Id.* Those uses are "threatened by the increasing population of Alaska, with resultant pressure on subsistence resources," and by "increased accessibility of remote areas," among other things. *Id.*

ANILCA does not define "rural." Legislative history does, however, explain that Congress intends to protect customary and traditional uses in places where such uses have "played a long established and important role in the economy and culture of the community." S. Rep. No. 413, 96th Cong., 1st Sess. 269 (1979) ("Senate Report").

The Secretary determined that Alaska's comprehensive subsistence law is consistent with ANILCA, and, under 16 U.S.C. § 3115(d), he did not implement ANILCA's subsistence protections himself.[2]

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[2] The Secretary initially certified compliance in 1982. App. A-5-6. Following Madison v. Alaska Dep't of Fish & Game, 696 P.2d 168 (Alaska 1985), holding that the state law did not limit subsistence to "rural residents," the Secretary notified Alaska that its laws were no longer consistent with ANILCA. App. A-6. In response, the Alaska legislature in 1986 modified the state subsistence statutes to limit subsistence to residents of rural areas, also defining "rural area." AS 16.05.940(25) and (30). The Secretary then concluded that Alaska's laws were again consistent with ANILCA, and thus refrained from taking any management measures with respect to subsistence fishing and hunting in Alaska. CR 11, ex. D; App. A-6-7.

In 1986, the Kenaitze Indian Tribe[3] alleged in district court that the state definition of "rural area" as places in the state in which noncommercial use of fish or game is "a principal characteristic" of the economy is not consistent with the term "rural" as used by Congress. The Kenaitzes also argued that the Kenai Peninsula – lying just south of Anchorage, Alaska's largest city and only metropolitan area[4] – is a rural place, and that they should be allowed to participate in subsistence uses there, in addition to or instead of the liberal nonsubsistence hunting, and sport and net fishing, opportunities already allowed on the peninsula.[5] The several hundred Kenaitzes who live on the Kenai are "widely dispersed" among the general population of 25,000 in the towns on

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[3] Alaska has denied that the Kenaitzes are a federally recognized "tribe" under 25 C.F.R. part 83. CR 12. The Kenaitze Indian Tribe has been listed in 50 Fed. Reg. 6055, 6058 (Feb. 13, 1985) as a "Native entity," distinguished from a "tribe."

[4] Statistical Abstract, U.S. Census Bureau (1981)

[5] The Alaska Board of Fisheries found in 1981 that there are no longer customary and traditional uses of salmon on the peninsula, and subsistence fishing has not been authorized there since then, except for two non-road connected communities. Madison v. Alaska Dep't of Fish and Game, 696 P.2d 168, 172 (Alaska 1985). However, peninsula residents are still able to hunt and fish; they may hunt on the peninsula for at least 16 game species, and, in addition to sport fishing, have access to salmon by efficient gillnets through the personal use fishing regulations, with liberal limits of 25 fish per household head, and 10 for each dependent. 5 Alaska Administrative Code 77.525, 546, 547, and 548, and 80.115 – 170.

the peninsula, including a suburban sprawl of over 10,000, made up of the Kenai's two largest communities.[6]

In ruling on the merits of the state's framework statutes, the district court held that Alaska's definition of "rural area" was consistent with ANILCA, relying on federal legislative history and the Secretary's certification. App. B-18-27. The court therefore denied the requested preliminary injunction. App. B-16-18. The district court stayed the other issue in the case – whether under the state's definition the Kenai Peninsula was correctly determined by Alaska to be a nonrural area – while the denial of the preliminary injunction was appealed.[7]

The ninth circuit reversed, holding that Alaska's definition is not consistent with ANILCA, and indicating that the Kenai Peninsula is rural under ANILCA. App. A-16. It remanded the case to the district court with instructions to issue a preliminary injunction. App. A-17. The

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[6] CR 4, ex. 11 at 9, 10; App. A-7; Alaska Department of Labor, *Alaska Population Overview, 1985 Estimates* (1987).

[7] Alaska had filed a motion to dismiss on the grounds that 16 U.S.C. § 3117(a) does not confer federal jurisdiction over a challenge to the state's statutes of general applicability approved by the Secretary under 16 U.S.C. § 3115(d). Alaska believes that the statute only authorizes suits against the state in federal court to challenge the adequacy of its implementing regulations once that approval has occurred. The district court denied the motion. If the court was correct in its finding of jurisdiction under 16 U.S.C. § 3117(a), the ninth circuit properly had jurisdiction under 28 U.S.C. § 1292(a)(1) over the appeal. However, during the appeal Alaska specifically noted that it reserved its jurisdictional challenge, which will be ripe for appeal upon the eventual conclusion of the case in the district court.

decision was premised on a determination that "rural" has a plain meaning, regardless of its context. App. A-12, 15. The ninth circuit thus declined to even look at the legislative intent underlying ANILCA. App. A-15. It also did not acknowledge that the Secretary's decision not to take over fish and game management in Alaska is subject to judicial deference. App. A-8-9.

REASONS FOR GRANTING THE WRIT

A. Summary

This case is critically important to rural Alaskans Congress intended to protect, because it dilutes the subsistence priority by dramatically expanding the class eligible for subsistence hunting and fishing. It will also have a striking effect on federal agencies that may, against the Secretary's own judgment, have to assume responsibilities they have neither budget, manpower, nor inclination for. Further, it is of profound concern to the State of Alaska which may lose management over fish and game on 60 percent of its area. The resulting patchwork of management responsibility will make protecting the resources that are the touchstone of subsistence dramatically problematic, since many fish stocks and game populations are migratory, and do not respect land ownership boundaries in their movements.

In rendering the decision below the ninth circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Moreover, the lower court has

decided a federal question in a way which conflicts with this Court's applicable decisions.

In purporting to apply the plain meaning rule to construe an ambiguous statutory term, and ignoring relevant legislative history and administrative interpretation, the ninth circuit has clearly refused to follow this Court's guidance about the proper role of the judiciary vis-a-vis Congress and the Executive Branch.[8] Further, the court's own examples of the purported plain meaning of "rural" reveal that it has no plain meaning and is ambiguous.

The decision below so flouts the rules laid down by this Court on the proper use of legislative history and the respect due to administrative interpretations that an exercise of this Court's powers of supervision is called for. This is especially true since the ninth circuit in one breath declares the term "rural" to have a plain meaning, and in

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[8] The author of the ninth circuit decision is an outspoken critic of reference to legislative history in statutory interpretation. Judge Kozinski's recent article, "Hunt for Laws' 'True' Meaning Subverts Justice," in the January 31, 1989, *Wall Street Journal*, concludes sharply:

> Lawyers must be taught that the plain language of the statute sometimes makes litigation pointless – if not frivolous. The time has come for the judiciary to make clear once again that we are a nation of laws, not legislative histories.

Unfortunately for the Secretary and for Alaska, in his quest to eradicate the scourge of legislative history Judge Kozinski has refused to acknowledge that in this case the term "rural" is a relative one, without a plain meaning, and has as a result interpreted it in a way demonstrably contrary to Congressional intent.

the next gives a series of examples of that meaning which, when applied to Alaska, produce contradictory results. Indeed, it is so clear that the Secretary's decision not to take over fish and game management in Alaska was correct, as was his determination that the Alaska definition of "rural area" is consistent with Congress' intent, that this would be an appropriate situation for this Court to order summary reversal, under Supreme Court Rule 23.1.

B. Rural Alaskans, federal and state agencies, and fish and game in Alaska will be profoundly and adversely affected by the lower court decision.

This case presents issues of vital importance to Native and non-Native Alaskans living in remote parts of the state. The ninth circuit has significantly diluted the subsistence protections of ANILCA by extending them to residents of places like the Kenai Peninsula, just south of Anchorage – a place even the ninth circuit admits currently has an economy "based primarily on work for cash," because of its "proximity to Anchorage." App. A-3. By substantially expanding the class eligible for subsistence hunting and fishing, the lower court's decision could mean that in some places in Alaska, even if non-subsistence harvests have been closed to protect subsistence uses, there will be such increased competition among the swollen numbers of subsistence users that the group Congress actually intended to protect will suffer.

Profoundly fundamental issues of state and federal authority are also presented, for the finding of inconsistency could severely disrupt resource management in

Alaska. Fish and game management has been a traditional state responsibility since the founding of the Union. While the federal government may have the power to regulate fish and wildlife on federal lands under the Property Clause of the United States Constitution, art. IV, sec. 3, cl. 2, that power will generally be exercised only after a state declines the opportunity to retain its management authority. *See, e.g., Kleppe v. New Mexico,* 426 U.S. 529 (1976). Up to this time, under ANILCA 16 U.S.C. § 3116 the Secretary has only been monitoring Alaska's hunting and fishing regulations adopted under its framework statutes. He has not actually managed fishing and hunting directly, as is required if those general laws are not consistent with ANILCA. 16 U.S.C. § 3115(d).

A consequence of the Secretary assuming management will be patchwork responsibility between federal and state agencies over migrating fish stocks and game populations, which care nothing for land ownership patterns. This split jurisdiction will increase substantially the difficulties faced in carefully husbanding these resources, so important to all Alaskans, and of paramount significance to subsistence users in the state's rural areas. Concerns that "splinter management" would "threaten effective resource protection" were expressed to Congress, and Congress concluded that "it is appropriate for the state to have responsibility for the day-to-day regulation" of all fish and game in Alaska rather than for a patchwork approach to be the management scheme of choice. H. Rep. No. 96-97, Part I, 96th Cong., 1st Sess. 540 (1979) and H. Rep. No. 1045, Part I, 95th Cong., 2d Sess. 184 (1978).

C. The lower court's own conflicting examples demonstrate that "rural" does not have a "plain meaning."

This Court has established a methodology for interpreting statutes, as explained in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984). If Congress has "directly spoken to the precise question at issue," that is "the end of the matter." However, if the statute is "silent or ambiguous" with respect to the specific issue, the court looks to the legislative history of the statute, and defers to any administrative interpretation as long as it is based on a "permissible construction of the statute."

The decision in this case purposts to follow that methodology, but actually does not. The court states that the term "rural is not difficult to understand; it is not a term of art," that it is "a standard word in the English language." App. A-12. Therefore, the court refuses to even consider legislative history because of the word's "plain meaning." App. A-15.

However, in trying to demonstrate that the term "rural" has a "plain meaning," the court gives a number of internally inconsistent examples of how the term is used in other instances. When applied to Alaska in general, and the Kenai Peninsula in particular, those examples produce contradictory results.

Initially, the court notes that "rural" is commonly understood to refer to sparsely populated areas "where the economy centers on agriculture or ranching." App. A-12. Examining an area's economy in determining whether it is rural is consistent with Congress' focus on

"economic development and rural character," and on places in the state where fish and wildlife use has played a "long established and important role in the economy and culture." Senate Report at 233, 269. However, Alaska's error (in the ninth circuit's view) apparently was in identifying the importance of fish and game as the critical determinant, instead of agriculture or ranching.

Restricting "rural" to areas where the economy centers on farming and ranching would result in only a handful of areas in Alaska being rural – mainly several river valleys. Congress, on the other hand, recognized that the term rural was to encompass communities and areas "scattered throughout the state." Senate Report at 233. Further, the few Alaskan agricultural areas are probably among the places in the state least dependent on wildlife use. In contrast, vast reaches accessible only by air and heavily dependent on hunting and fishing would be nonrural under this approach.

The lower court also indicated that defining rural by excluding from the definition communities of a certain population would be permissible: "More broadly, rural is the antonym of urban and includes all areas in between cities and towns of a particular size." App. A-12. The court then cited a number of federal statutory definitions which it termed "consistent with conventional understanding." App. A-13.

One cited definition is 42 U.S.C. § 1395ww(d)(2)(D) (Supp. IV 1986). App. A-13. That statute defines rural area for the purpose of computing social security payments to hospitals as any area outside an urban area, which in turn is defined as an area within a "Standard

Metropolitan Statistical Area." Under that approach, all of Alaska except Anchorage would be rural, *see* Statistical Abstract, U.S. Census Bureau (1981), including three communities which Congress specifically identified as not being rural under ANILCA: Ketchikan, Juneau, and Fairbanks. Senate Report at 233.

Under another cited definition, used by the U.S. Census Bureau, only villages of less than 2,500 people would be rural. App. A-12-13. Under that approach, many Alaska communities which now are classified as rural would be reclassified as nonrural, including four of the five communities specifically identified by Congress as examples of rural communities under ANILCA: Bethel (pop. 4006), Nome (pop. 3191), Barrow (pop. 3075), and Kotzebue (pop. 2633). Senate Report at 233; Alaska Department of Labor, *Alaska Population Overview, 1985 Estimates* (1987). In addition, using that definition, the three largest communities on the Kenai Peninsula would not be rural: Kenai City (pop. 6518), Soldotna (pop. 3818), and Homer (pop. 3632). *Id.*

The court's own examples of the term rural thus demonstrate that the word does not have a plain meaning. The simple reality is that the term "rural" is a relative one, and its meaning depends on the context in which, and purpose for which, it is used.[9] For example, it

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[9] The canon of construction interpreting doubtful terms in favor of Indians applies only to circumstances where Indians affected by the law would receive a more favorable result

(Continued on following page)

is not clear how another of the "common sense" meanings of rural cited by the court could reasonably be used to provide a priority for subsistence hunting and fishing. The example ties the rurality of an area to the presence or lack of "mortgage credit for lower and moderate-income families," a key component in the definition used in the Housing Act, 42 U.S.C. § 1490. App. A-13.

The court nonetheless applied the plain meaning rule and, relying on *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), determined that resort to legislative history was unnecessary and inappropriate. App. A-15. The court's own examples demonstrate that the term rural can have a variety of meanings – i.e., that it is ambiguous – and does not have a plain meaning. The court should have both looked at relevant legislative history and deferred to any administrative interpretation as long as it is based on a permissible construction of the statute. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984).

(Continued from previous page)

under one interpretation. *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In the instant case, especially in light of the varying examples of the meaning of "rural" in the decision, Alaska Natives as a whole will not necessarily benefit from the interpretation urged by the Kenaitzes, and certainly would fare worse under the lower court's "agriculture and ranching" and Census Bureau examples.

D. Federal legislative history fully supports Alaska's definition of "rural area," and demonstrates that the "plain meaning" identified by the lower court is contrary to Congressional intent.

The court's application of the plain meaning rule clearly was incorrect. Moreover, if the court had considered the relevant legislative history, it would have discovered that the Secretary's administrative interpretation conforms to the intent underlying ANILCA. In contrast, the court's purported plain meaning approach actually produces results that are demonstrably inconsistent with Congress' intent.

In the legislative history of ANILCA Congress does not reference population or density levels in conjunction with a discussion of rural. Instead, Congress specifically identifies some communities which are not rural under ANILCA: Ketchikan, Juneau, Fairbanks, and Anchorage. Senate Report at 233. Three of those communities would, however, be rural under at least one definition apparently approved by the court. At the same time, other communities which Congress expressly states are rural under ANILCA – Bethel, Nome, Barrow, and Kotzebue – would not be rural under at least one definition apparently approved by the court. *Id.*

More specific to the instant case, when Congress enacted ANILCA in 1980, it apparently assumed that the Kenai was not rural, and that there were no subsistence uses there that required federal protection. The Kenai National Wildlife Refuge, consisting of nearly 2 million acres (the size of Rhode Island and Delaware combined), was the only one of the 16 refuges in Alaska established

or expanded by ANILCA that did not have the continuation of subsistence uses listed as a statutory purpose. 16 U.S.C. § 668dd. In reaching the opposite conclusion, the ninth circuit relied on a brief description in *The Milepost*, a travelers' guide outside the record, designed to promote tourism, to decide that the Kenai is rural. App. A-7. In so doing, the court ignored its own acknowledgment that the Kenai's "proximity to Anchorage" and the development of adjacent oil fields has "transformed the peninsula's economy to one based primarily on work for cash." App. A-3, 20.

Congress intended to protect customary and traditional uses in places where such uses have "played a long established and important role in the economy and culture of the community," an intent clearly reflected in Alaska's definition. Senate Report at 269. Another example supporting the correctness of the state's definition is the explicit statement that "the direction of the economic development and rural character of such communities may change over time." *Id.* at 233. These statements evidence that Alaska's definition of rural areas as places in the state where the noncommercial use of fish and game is "a principal characteristic of the economy" is consistent with Congressional intent.

E. The Secretary's consistency determination and concomitant decision not to displace state management on federal lands in Alaska is due deference under principles of statutory construction and under separation of powers doctrine.

The ninth circuit ignored the principles of statutory construction set out in *Chevron U.S.A. v. National*

Resources Defense Council, 467 U.S. 837, 843-45 (1984), when it gave no significance whatsoever to the Secretary's decision not to begin managing fishing and hunting in Alaska, nor to his certification that the Alaska law was fully consistent with ANILCA. App. A-8-9. The ninth circuit concluded that, once Alaska had adopted an approved management regime, the Secretary no longer had authority to act. *Id.* His second certification of consistency, according to the court, "had no legally operative effect" and was not "the type of agency action to which a court owes deference." *Id.*

The court ignored ANILCA's mandate that the federal management scheme is stayed in favor of state management only if Alaska's laws "are consistent with" ANILCA. 16 U.S.C. § 3115(d). If Alaska's laws are inconsistent, the Secretary must implement ANILCA's subsistence priority on federal lands. ANILCA affords him no alternative, and his determination that he does not need to do so because the laws are consistent is entitled to deference, especially when, as here, it is abundantly clear that his decision is consistent with legislative history.

Thus, the lower court's refusal to consider the Secretary's interpretation violates the statutory construction principles established by this Court. What is worse, however, is the failure of the ninth circuit to respect the constitutional separation of powers doctrine. Under that doctrine, policy decisions are left to the political branches of government. *Chevron U.S.A.*, 467 U.S. at 864-66. In this case, the ninth circuit simply concluded that the Secretary's policy decision not to take over management in Alaska in light of the state's statutory subsistence protections did not conform to its notion of an appropriate policy. In doing so, the court ignored a fundamental

precept of our constitutional system: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978).

This Court repeatedly has emphasized the importance of the separation of powers doctrine: "Time and time again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into three coordinate branches." *Morrison v. Olson*, 467 U.S. ___, 101 L.Ed.2d 569, 607 (1988). The ninth circuit decision conflicts with all of those principles.

CONCLUSION

For the foregoing reasons, the ninth circuit's decision should be reviewed and reversed by this Court. The Petition for Writ of Certiorari should be granted, or the decision below should be reversed summarily.

DATED: April 4, 1989

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENAITZE INDIAN TRIBE, *Plaintiff-Appellant,* v. STATE OF ALASKA, *Defendant-Appellee.*	No. 87-4110 D.C. No. CV-86-367 ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued and Submitted
August 1, 1988 – Anchorage, Alaska

Filed October 24, 1988
Amended January 4, 1989

Before: Alex Kozinski, John T. Noonan, Jr. and David R. Thompson, Circuit Judges.

Opinion by Judge Kozinski; Concurrence by Judge Noonan with whom Judge Thompson joined

ORDER

The panel has voted to amend its opinion by adding a new footnote 8 after the word "indirection" in column 2, line 15 of 860 F.2d at 318:

> The state argues that article IV, section 4 of the Constitution, which "guarantee[s] to every State in this Union a Republican Form of Government," and the tenth amendment, which reserves to the states powers not delegated to the federal government, preclude a federal court from directing the state to amend its laws to make them consistent with

ANILCA. Whether or not this proposition is correct, it has no relevance here. We do not purport to be directing the state to amend its laws; it is free to eschew any further entanglement with the federal government by advising the Department of the Interior that it is withdrawing from its role in administering ANILCA.

Existing footnote 8 is accordingly renumbered as footnote 9.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote thereon. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

KOZINSKI, Circuit Judge*:

We travel to the northern reaches of our circuit to resolve a dispute implicating two recurring Alaskan motifs: on the one hand, the clash between traditional and modern ways of life; on the other, fish. The Kenaitze Indian Tribe claims that the state of Alaska is attempting to evade federal legislation creating a priority for subsistence fishing by residents of rural areas. The controversy turns on the meaning of the word "rural" as used in the

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*Judge Thompson joins this opinion in its entirety. Judge Noonan joins part I, II and IV.

Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980)(codified as amended in scattered sections of Titles 16 and 43 of the United States Code).

I

The Kenaitze, a tribe numbering approximately four hundred, have lived on the Kenai Peninsula, in southern Alaska, for hundreds of years. For most of their history, the Kenaitze have pursued a way of life dominated by subsistence fishing and hunting. In recent years, however, the area's proximity to Anchorage has made the Kenai Peninsula a center of commercial and sport fishing, and has transformed the Peninsula's economy to one based primarily on work for cash. Subsistence fishing has been crowded out by commercial harvesting and by sport fishing, the latter pursued with all the zeal of a Crusade. *See* Medred, *Combat Fishing*, Anchorage Daily News, May 15, 1988, at J-1 (describing "Alaska streams sometimes hidden behind a wall of humanity"); Freedman, *Fish Hard Die Free: Profiles in Carnage*, We Alaskans (Anchorage Daily News Magazine), Aug. 7, 1988, at N-7, N-8 ("It's said there are two kinds of people in Alaska: Those Who Fish, and Those Who Watch"); Jenkins, *So Many Fishermen, So Few Flies*, Anchorage Daily News, Aug. 10, 1988, at B-1.

In response to similar changes occurring throughout Alaska, Congress enacted ANILCA in 1980. The Act contains a number of provisions relating to conservation on federal lands, including the establishment of new units of

the National Park, National Forest and National Recreation Area systems. Title VIII of ANILCA protects subsistence fishing by giving such fishing a priority over other types of fishing in federal waters in rural areas. 16 U.S.C. §§ 3111-3126 (1982 & Supp. IV 1986).

Congress prefaced Title VIII with a declaration that "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is essential to Native physical, economic, traditional, and cultural existence. . . ." *Id.* § 3111(1). Congress further found that because "continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska [and] by increased accessibility of remote areas containing subsistence resources," *id.* § 3111(3), it was necessary for Congress "to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." *Id.* § 3111(4).[1]

ANILCA accordingly provides that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." *Id.* § 3114. Section 3113 defines "subsistence uses" as "the

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[1] Early drafts of Title VIII protected only subsistence uses by Native Alaskans. When the state advised Congress that the Alaska Constitution might bar the enforcement of a preference extended only to Natives, Congress broadened the preference to include all "rural residents." 126 Cong. Rec. 29, 278-79(1980)(statement of Rep. Udall). The state's subsequent narrowing of the definition of "rural residents" to exclude the native villages here, *see* pp. 13310-12 *infra*, is thus more than a little ironic.

customary and traditional uses by *rural Alaska residents* of wild, renewable resources" for a variety of uses. *Id.* § 3113 (emphasis added).

The statute directs the Secretary of the Interior to establish the administrative structure necessary for the implementation of the statute. *Id.* § 3115(a)-(c). The federal regulatory scheme is to be stayed, however, if the state of Alaska enacts laws "which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title." *Id.* § 3115(d). The Secretary is to monitor the state's performance in this regard, and to report periodically to appropriate congressional committees. *Id.* § 3116. ANILCA authorizes any person or organization aggrieved by the failure of the state or federal government to enforce the subsistence priority set forth in section 3114 to file a civil action for injunctive relief in federal district court. *Id.* § 3117. Section 3117 provides the jurisdictional basis for this lawsuit.

Given the choice between federal regulation or self-regulation with federal oversight, Alaska chose the latter. The state enacted the necessary statutes in 1978, while Congress was still working on the final version of ANILCA. Pursuant to the state statutes, the state Joint Boards of Fish and Game promulgated regulations which, among other things, defined rural as describing any area other than a community with a population of 7,000 or more. Residents of these rural communities were to be afforded ANILCA's priority for subsistence fishing. In 1982, the Secretary of the Interior certified that the state legislative program was in compliance with ANILCA.

Letter from Secretary James Watt to Governor Jay Hammond (May 14, 1982). This certification suspended federal regulation and left the state in charge of implementing ANILCA.

Soon after certification was completed, the Joint Boards of Fish and Game issued a new regulation, which materially altered the definition of rural and substantially narrowed the areas where subsistence fishing would be afforded a priority. According to the new definition, identification of a rural area depended on ten criteria, including the current pattern of subsistence uses by groups inhabiting the area. The principal effect of the new regulation was to deny the subsistence fishing priority to residents of areas dominated by a cash economy. In 1985 this regulation was invalidated by the Alaska Supreme Court as inconsistent with state law. *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985). The Alaska Legislature revived the regulation by amending the statute to conform to it. As amended, the statute defines "rural area" to mean "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area."Alaska Stat. § 16.05.940(25) (1987).

Invalidation of the earlier regulation in *Madison* had caused the Interior Department to advise the Governor of Alaska that the state had fallen out of compliance with ANILCA. After the new legislation, the Assistant Secretary of the Interior for Fish and Wildlife and Parks wrote a letter to the Governor of Alaska purporting to certify that the state was once again in compliance. Letter from

Assistant Secretary William Horn to Governor Bill Sheffield (Nov. 7, 1986).

The Kenai Peninsula qualifies as a rural area under the state's original definition of the term, but not under the new definition. While vast areas of the Peninsula are covered by countryside and wilderness, its economy is no longer dominated by subsistence and barter.[2] This means that under the new state scheme, subsistence fishing in the Kenai is denied the priority provided by ANILCA. The Kenaitze, some of whom continue to engage in subsistence fishing, brought suit challenging this change in state law. The Tribe sought an order directing the state to promulgate regulations defining rural in a manner that would implement the federal subsistence priority. Along with the complaint, the Tribe filed a motion for summary judgment and asked the court for a preliminary injunction to prevent the state from enforcing its existing statutory and regulatory definition of rural. The district court denied both motions, and granted the state's cross-motion for partial summary judgment on the issue of

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[2] Counsel for the state graphically described the situation at oral argument: "The Kenai Peninsula has Sears, Safeway stores and malls." True enough. Yet the Kenai has a long way to go before it approaches anything resembling an urban community. Its 25,000 inhabitants are spread over an area of 16,000 square miles, roughly the size of New Hampshire and Vermont combined. *The World Almanac* 573, 418 (1988). "The scenery is varied and beautiful. The massive peaks and broad ice fields of the Kenai Mountains form the spine of the peninsula, dropping away to the great forested plateau of the western area. Its many lakes, rivers and streams make the Kenai a prime sport-fishing destination." *The Milepost* 336 (40th ed. 1988).

whether Alaska was in compliance with ANILCA. The Tribe took an interlocutory appeal from the denial of the preliminary injunction. 28 U.S.C. § 1292(a)(1)(1982).

II

We must first consider whether we interpret the statute de novo, or whether we owe deference to the interpretation already adopted by the Department of the Interior and the state of Alaska, as the entities charged with the statute's enforcement. The state, supported by the Secretary as amicus,[3] argues that we owe deference to the interpretation advanced by the Secretary. Specifically, the state points to the 1986 letter from the Assistant Secretary for Fish and Wildlife and Parks, which approves the state's revised definition of rural. Since the Secretary is charged with implementing ANILCA, the argument goes, we should defer to his determination that the state's definition of rural conforms with federal law.[4]

Deference to an administrative agency's construction of a statute is appropriate, however, only where the agency is entrusted with the administration of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Blum v. Bacon*,457 U.S. 132,

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[3] Plaintiffs sued only the state, not the Secretary of the Interior. As noted, this type of lawsuit is authorized by ANILCA, 16 U.S.C. § 3117, and is designed to bring state regulation into compliance with federal law.

[4] The Secretary delegated the authority to make this determination to the Assistant Secretary for Fish and Wildlife and Parks. U.S. Dep't of the Interior, Departmental Manual 209 DM 6.1 (May 2, 1983)(No. 2489).

141 (1982). We defer, therefore, only where the agency acts pursuant to a delegation of statutory authority. The 1986 letter was not such an action. The Secretary's responsibility in administering the Act includes an initial certification that the state has implemented a statute that complies with ANILCA and that federal regulation should accordingly be withheld. 16 U.S.C. § 3115(d). Once the state regulatory scheme is in place, the Secretary's powers are limited to monitoring the state's implementation of its legislative program and making periodic reports to Congress. *Id.* § 3116. ANILCA thereafter vests the power to approve or disapprove the state's performance in the courts alone. *Id.* § 3117(a).[5] The Assistant Secretary's 1986 letter purporting to recertify the state's compliance thus had no legally operative effect. Not being an exercise of the Secretary's statutory authority, it did not constitute the type of agency action to which a court owes deference.[6]

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[5] Although section 3117(a) requires the "exhaustion of any State or Federal (as appropriate) administrative remedies which may be available," it is clear in context that "Federal (as appropriate) administrative remedies" refers to remedies that would exist if the state had not supplanted ANILCA's regulatory scheme with its own. Because the state has accepted section 3115(d)'s invitation to supersede federal regulation, there is no federal administrative remedy for a plaintiff to exhaust. The state, however, makes no claim that the Kenaitze have failed to exhaust any available state administrative remedies.

[6] While we need not defer to the Secretary, his views are nevertheless valuable to the court in light of the Secretary's intimate familiarity with the statutory scheme and his supervisory responsibilities over the federal lands in question. We have given the Secretary's views, as expressed in the government's amicus brief, due consideration.

A more interesting question is posed by the suggestion that we defer to the *state*'s interpretation of ANILCA. The state's claim to deference is based on the fact that it performs functions not unlike those of a federal agency charged with implementing an Act of Congress. State law here operates like an agency regulation; state authorities, therefore, can claim to stand in the shoes of federal regulators.

While this argument is not without appeal, we reject it. Deference to a federal agency's interpretation of a statute is based in part on the expertise it possesses in implementing federal policy in the general subject area. *See Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-90 (1984). While Alaska has a long history of managing large wilderness areas, it lacks the expertise in implementing federal laws and policies and the nationwide perspective characteristic of a federal agency. Federal agencies are also entitled to deference because their activities are subject to continuous congressional supervision by virtue of Congress's powers of advice and consent, appropriation, and oversight. Such direct and continuous congressional supervision is absent when state authorities are doing the regulating.

Most fundamentally, unlike a federal agency, the state is delegated no authority under ANILCA. The statute only provides that if the state wishes to regulate in a manner consistent with federal law, federal regulation will be withheld. ANILCA does not assign any particular functions to the state as, indeed, it could not. As a separate sovereign, the state is at all times free to refuse to regulate; Congress could not compel it to do so. If the state refuses, the Department of the Interior will step in

and do the job. The state's role is thus more accurately characterized as supplanting the federal regulatory scheme, rather than implementing it. Deference is not appropriate.

We must therefore determine the statute's meaning on our own. It is to this task we now turn.

III

This case boils down to what Congress meant when it legislated a priority for "customary and traditional uses by *rural* Alaska residents of wild, renewable resources." 16 U.S.C. § 3113 (emphasis added). The state has selected an unusual definition of the term rural, a definition that excludes most areas normally understood to be covered by the term. As Alaska defines the word, an area is rural only if its economy is dominated by subsistence fishing and hunting; it excludes areas characterized primarily by a cash economy, even though a substantial portion of the residents may engage in subsistence activities. The state's definition would exclude practically all areas of the United States that we think of as rural, including virtually the entirety of such farming and ranching states as Iowa and Wyoming.

The state argues that its definition of rural best promotes ANILCA's policy of protecting the subsistence way of life by excluding areas where that way of life has already been supplanted by a cash economy. The state's argument stands the process of statutory construction on its head. We look to policy in interpreting the statutory language; we do not rewrite the language to conform to

the policy.[7] While statutory words sometimes have more than one meaning, and interpreting the statute may require judgment as to which of these meanings Congress contemplated, an interpreting body may not invent a completely new meaning for a statutory term. Any other rule of construction would rob statutes of binding force and allow free rein to those who implement federal statutes to do what they wish rather than what Congress directed.

The term rural is not difficult to understand; it is not a term of art. It is a standard word in the English language commonly understood to refer to areas of the country that are sparsely populated, where the economy centers on agriculture or ranching. *See* Webster's Third New International Dictionary 1990 (1981). More broadly, rural is the antonym of urban and includes all areas in between cities and towns of a particular size. *See id.*

The term has been used by the federal government in a variety of other contexts, all of them consistent with conventional understanding. The U.S. Census Bureau, for example, divides the population into two categories. The urban population consists of people living in communities of 2,500 or more, while the rural population comprises everyone else. U.S. Dep't of Commerce, Bureau of the Census, *1980 Census of Population*, vol. I, ch. B., part 3,

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[7] The state does not, of course, claim to be rewriting the statutory language. No one ever admits to taking a blue pencil to an Act of Congress. But precisely the same end is achieved through creative interpretation. Assigning exotic definitions to statutory terms alters the statute just as surely and effectively as changing the statutory language.

at A-2. Many federal statutes use the word rural in its conventional sense. *See, e.g.*, 42 U.S.C. § 1395ww(d)(2)(D) (Supp. IV 1986) (for purposes of computing Social Security payments to hospitals for inpatient hospital services, "rural area" defined as any area outside a metropolitan area); 42 U.S.C. § 1490 (Supp. IV 1986) (for purposes of applying Title V of Housing Act of 1949, "rural area" defined as "any open country, or any place, town, village, or city which is not part of or associated with an urban area" and where the population does not exceed certain limits). The Federal Communications Commission and the Federal Housing Administration similarly define rural in terms of an area's population. *See National Cable Television Ass'n v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984); 7 C.F.R. § 1944.10 (1988). We are aware of no federal statute or regulation that uses the word rural in any sense other than the commonly accepted one.

The state contends, nevertheless, that its definition of the term is appropriate in the context of ANILCA because it best serves the congressional goal of protecting the traditional subsistence way of life in areas where that way of life is predominant. Even if we agreed that this approach more clearly accomplishes the purpose behind ANILCA -- a proposition we would be reluctant to endorse -- Congress passes laws, not purposes. What matters is not some general purpose that may have motivated the lawmakers but the means they chose to achieve that end. The fact that we can conceive of a better way of accomplishing what we think may have been the congressional purpose does not give us license to ignore the means Congress actually adopted.

Here Congress did not limit the benefits of the statute to residents of areas dominated by a subsistence economy. Instead, it wrote broadly, giving the statutory priority to all subsistence users residing in rural areas. To accept the state's contorted definition of rural would materially change the sweep of the statute, second-guessing the congressional policy judgment embodied in ANILCA. This we may not do.

The state's definition of rural would also lead to an inconsistency within the statute. ANILCA establishes not one but two levels of priority. The first, already discussed, gives subsistence users living in rural areas priority over other users. But the statute then goes on to consider the possibility of fish and wildlife shortages so severe that even the subsistence uses must be curtailed. In such a situation, certain subsistence users enjoy a priority over others. Which subsistence users receive this benefit? Those who can establish "customary and direct dependence upon the [fish and wildlife] populations as the mainstay of livelihood." 16 U.S.C. § 3114(1). Under the state's approach, this provision would be robbed of all meaning. Because the state's narrow interpretation of section 3113 limits the benefits of ANILCA's general priority to residents of areas where subsistence fishing is the mainstay of livelihood, anyone who qualifies for those benefits would also qualify for the more restrictive priority of section 3114(1). We cannot adopt a statutory interpretation that renders one portion of the statute redundant when there is another interpretation that avoids such redundancy. Congress quite clearly intended that section 3113 encompass a larger class of beneficiaries

than section 3114(1). Giving the term rural its conventional meaning accomplishes this while the state's interpretation does not. Even if the state's interpretation were otherwise permissible, we would have to reject it in the name of internal statutory consistency.

The state nevertheless places heavy reliance on ANILCA's legislative history which, the state argues, overcomes all other considerations. But legislative history is not a panacea; it cannot overcome the structural and semantic problems discussed above. As the Supreme Court said with respect to this very statute, "[w]hen statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily 'the end of the matter.'" *Amoco Production Co. v. Village of Gambell*, 107 S.Ct. 1396, 1408 (1987) (citation omitted). *See also Bethesda Hosp. Ass'n v. Bowen*, 108 S. Ct. 1255, 1258 (1988); *United States v. Taylor*, 108 S. Ct. 2413, 2423 (1988) (Scalia, J., concurring in part)(where meaning of a statute is clear, "there is no justification for resort to the legislative history"). Congress has used a simple term, one that is not reasonably susceptible to the interpretation the state advances. The legislative history, even if it were relevant, could not infuse a statutory term with a meaning to which it is not susceptible.

We conclude therefore that the state's redefinition of rural does not comport with section 3113. Alaska has failed to enforce the statute's subsistence priority; the state is not in compliance with ANILCA.

IV

We end as we began. This is a case involving a clash of lifestyles and a dispute over who gets to fish. Congress, using clear language, has resolved this dispute in favor of the Kenaitze who choose to pursue the traditional subsistence way of life by giving them priority in federal waters. The state has attempted to take away what Congress has given, adopting a creative redefinition of the word rural, a redefinition whose transparent purpose is to protect commercial and sport fishing interests.

The state is not required to regulate pursuant to ANILCA. If it does so, however, it is bound to implement the statute as Congress passed it, not as some of its citizens would prefer that it had been passed. If Alaska believes that the subsistence priority is too generous, or interferes too severely with commercial and recreational fishing, its elected federal representatives can attempt to amend the statute. The state may not achieve the same objective through indirection.[8]

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[8] The state argues that article IV, section 4 of the Constitution, which "guarantee[s] to every State in this Union a Republican Form of Government," and the tenth amendment, which reserves to the states powers not delegated to the federal government, preclude a federal court from directing the state to amend its laws to make them consistent with ANILCA. Whether or not this proposition is correct, it has no relevance here. We do not purport to be directing the state to amend its laws; it is free to eschew any further entanglement with the federal government by advising the Department of the Interior that it is withdrawing from its role in administering ANILCA.

We reverse the judgment of the district court and remand for entry of a preliminary injunction.[9]

NOONAN, Circuit Judge, with whom THOMPSON, Circuit Judge, joins, concurring:

The Kenaitze live principally along the eastern shore of Cook Inlet from Anchor Point to Point Possession, though some possibly inhabit the western shore, principally at Kuskatan. Clare Swan, *Subsistence Research Project Kenaitze Indian Tribe* 3 n.1 (1981). The Tribe consists of approximately 400 descendants of Tanaina Athabaskan Indians who replaced Eskimos on the Kenai Peninsula sometime between 500 and 1500 A.D. Carolyn E. Reed, *The Role of Wild Resource Use of Communities of the Central Kenai Peninsula and Kachemak Bay, Alaska* 13 (1985). The rhythm of life of the Tribe in the days in which its traditions were established appears to be captured in these words:

DENAI'NA SEASONAL CYCLE

tuneyashi	the snow begins to melt
tlkhu-khakeneu	people catch king salmon
talkheneu	the geese come flying
koonaneo	people catch pink salmon

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[9] ANILCA provides that "[l]ocal residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees." 16 U.S.C. § 3117(a). In the interest of convenience and economy, we instruct the district court on remand to award the Kenaitze an amount equal to their attorneys' fees for bringing this action, including this appeal.

banan-kantlkhtsi	the berries ripen
banan-ttstanashi	people come away from the hills
banan-ktichiki	the foilage is red
bkanchenshane	the earth grows cold
golchana-naga	people go to visit one another
takoshi	the geese fly south, the bear hides himself
banan-tlkhtsi	it begins to snow
banan-tuksti-tlkhe	the days begin to lengthen

Robert E. Ackerman, *The Kenaitze People* 53-54 (1972), cited in Swan, *supra,* after p.4.

Russians arrived and Russian settlements were established near the end of the eighteenth century, introducing a trade in furs. American traders replaced the Russians after 1867. Commercial salmon fishing by Americans began in 1880 with a cannery being built at Kasilof. Reed, *supra,* at 14-15 (1985).

The traditional life appears to have been relatively unchanged when it was surveyed in 1931-1934 by an anthropologist, Cornelius Osgood. He wrote:

> Five kinds of salmon appear in the Tanaina area–humpbacks, dogs, silvers, reds, and kings. The humpbacks swim every place in the bays and creeks during their season around Seldovia. At Kenai they make their main run during July when they go far up the rivers. Humpback salmon appear in the Upper Inlet but they are said to be only occasional visitors

around Tyonek and there are none at Iliamna. The same information is true for dog salmon, except that they apparently do not go so far up the rivers, a few appearing around Tyonek in late July. The silver salmon run late in the season. They occur in all areas except Iliamna and are noted for the fact that they travel a long way up the rivers. The most important of all, especially since they come at a time when food is scarce, are the red and king salmon, which the Tanaina look for in May. The king salmon do not appear in Kachemak Bay and at Iliamna, however. At Iliamna, red salmon supply the principal summer food.

The ordinary native method of catching salmon is to construct a weir by damming a creek or small river with a construction of logs and debris, set diagonally upstream from each side toward a small opening in the center through which the fish are force to pass, thus entering a V-shaped trap of logs about ten feet on a side, from which they cannot extricate themselves. One man stands in the trap and with a small dip-net takes out two or three fish at a time, which another man kills with a club. A third man puts a spruce root line through their gills (or throws them into a boat) and brings them ashore. Sometimes, instead of the simple fish weir, the Indians make a basket trap of long alders with a conical entrance which they place at the opening of the dam. They remove the fish from a door in the same manner as described above. The Kachemak Bay Tanaina do not use a gaff-hook in fishing, but at Kenai the latter instrument serves for catching crabs.

The Tanaina also catch fish by the use of a drag-net made of alder poles tied together with spruce root line. Men take hold of each end, and with another man in the middle, they push the fish into shallow water, where they kill them with wooden clubs. Sometimes the fish are pushed on to flats where they strand at low tide. When all the fish have been taken ashore, an old man counts and divides

> them equally. The women clean the fish, the boys wash them, and old men hang them up to dry.

Cornelius Osgood, *The Ethnography of the Tanaina* 28-29 (1937), *reprinted in* 16 *Yale Univ. Publications in Anthropology* (1966).

After World War II, homesteading increased on the Kenai Peninsula. The development of oil fields led to substantial growth after 1957. Reed, *supra*, at 17. In 1951 a highway was completed linking the Kenai Peninsula to Anchorage and leading to a substantial increase in tourism. In economic terms commercial fishing ranks first; oil production, second; tourism, third. *Id.* at 18.

By 1976 it was observed that in rural Alaska a shift had occurred from an economy of subsistence fishing and hunting, rounded out by work for cash, to a cash economy, rounded out by subsistence activities. The shift varied greatly from village to village. Indeed the mix of cash and subsistence uses varied according to four factors: the season; the number of persons working in the family; the availability of cash-paying jobs; and the availability of subsistence resources. Nancy Yaw Davis, *Steps Toward Understanding Rapid Culture Change in Native Rural Alaska*. Federal-State Land Use Planning Commission for Alaska: *Commission Study No. 16* 23 (1976).

There are now 30 different occupations which have been identified as providing cash incomes to Natives. Swan, *supra*, 7. About 9 percent of persons on the Tribe's voting roll hold commercial fishing permits. *Id.* at 6.

The number of salmon caught for subsistence has been very small in relation to commercial harvesting. For

example in 1980 in which a very high number of subsistence permits (1,219) were issued, the total salmon caught by subsistence users was 14,279. The salmon commercially harvested were 4,128,130. Swan, *supra*, Table I after p.6. From 1971 to 1980, commercial, sport and subsistence user groups on the Cook Inlet caught 4 million salmon in even years, and in the odd years 3.8 million. *Id* at II-1. Commercial fishermen caught 95 percent of the salmon and sports fishermen were the second largest harvesters of salmon. *Id*. at II-2. One study of the Upper Cook Inlet found that the percentage of the salmon harvest attributable to subsistence fishermen constituted .008 percent in 1977, .07 percent in 1978, .47 percent in 1979, and .33 percent in 1980. Stephen Braund, *Cook Inlet Subsistence Salmon Fishery* 33 (1982).

As this review indicates, I have taken a look – the kind of preliminary look necessary to consider a preliminary injunction – at facts that appear not to be in dispute. Three things stand out: First, there was a long tradition of the subsistence uses of salmon by the Tribe. Second, there has been considerable economic and social change on the Kenai Peninsula. Third, the subsistence uses are very small compared with the salmon taken by commercial and sports fishermen. These patterns point in different directions as to what good regulation of subsistence uses on the Kenai Peninsula would require. As a court of appeals we are certainly not in a position to decide.

What we are in a position to decide is what the Conservation Act requires. The Conservation Act could be interpreted as freeing Alaska to do what it likes if the laws it first enacted met the requirements of 16 U.S.C. § 3115(d). But the statute itself provides that if the Alaska

laws "are repealed" they no longer supersede the federal law governing state responsibility. *Id.* The change in Alaska Legislation in May 1986 may fairly be interpreted as a repeal of the laws that had been found by the Secretary to be in compliance with the Conservation Act.

If the statute was read in the most literal way possible, Alaska would have lost its only chance to take responsibility – it would have repealed the laws that were satisfactory. It would have no opportunity to reenact others. But we think such a wooden reading of the Conservation Act would be contrary to the basic thrust of the legislation. If Alaska is not in conformity with the Conservation Act, it may again get itself within the federal requirements.

Alaska supposes that it can get into conformity by a certification by the Secretary. The Secretary takes the same position, in an amicus brief arguing that the court should defer to his certification. But there is simply no provision in the statute for the Secretary assuming this role. The Secretary had one directive to carry out under section 3115(d), and he did so. After that his role is to monitor the provisions of the state and report to Congress. 16 U.S.C. § 3116.

We are directed by Section 3117 to enforce a federal statute. There is no basis for us to defer either to the Secretary or the state. Congress provided in explicit terms what is to be given priority. It is "non-wasteful subsistence uses," 16 U.S.C. § 3114, which are "the customary and traditional uses" of "rural Alaska residents." 16 U.S.C. § 3113. The uses of *residents* are not the uses of rural areas or communities or groups. At the time the

statute was enacted it was clear that traditional subsistence uses varied from village to village, season to season, family to family. Davis, *supra* at 23. The statute is directed to the protection of individuals who individually followed the traditional ways.

The state may not subtract from this federal statute. It has done so and so must be enjoined. The Tribe is entitled to an injunction providing that subsistence uses of fish by members of the Tribe shall be given a priority by the state over all other uses so far as necessary as to preserve the subsistence uses of such users. 16 U.S.C. § 3114.

I also concur in parts 1, 2, and 4 of the opinion of the court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

KENAITZE INDIAN TRIBE, Plaintiff, vs. STATE OF ALASKA, Defendant.	No. A86-367 Civil *ORDER* (Filed July 9, 1987)

Preliminary Injunction Denied;
Defendant's Motion to Dismiss Denied;
Plaintiff's Motion for Summary Judgment Denied;
Defendant's Motion for Partial Summary Judgment Granted

The Court now has under consideration Plaintiff's motion for a preliminary injunction. As a result of status conferences held with counsel subsequent to oral argument on Plaintiff's motion for preliminary injunction, and by agreement of counsel as reflected in the Court's order of April 16, 1987, the Court has withheld its decision on the motion for preliminary injunction and has proceeded with consideration of Plaintiff's motion for summary judgment and Defendant's motion to dismiss or for summary judgment. Oral argument as to the latter motions has been waived inasmuch as the case was thoroughly argued as to the merits in conjunction with argument of the motion for preliminary injunction.

All of the foregoing motions have as their focal point the provisions of the Alaska National Interest Lands Conservation Act ("ANILCA"). Thus it will be useful as a preliminary to deciding the motions before the Court to set out a history of the development of ANILCA and, in particular, the history of that act as it affects the taking of fish for food purposes by rural Alaska residents who would engage in a subsistence lifestyle.

History of ANILCA and Alaska Subsistence Laws

In 1973, Congress began considering what ultimately became the Alaska National Interest Lands Conservation Act. ANILCA became law on December 2, 1980, as Pub. L. No. 96-487, 16 U.S.C. §§ 3101-3233[1] (hereinafter the section numbers of title 16, United States Code, will be used for references to ANILCA).

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[1] The origins of ANILCA date back to 1971 when Congress passed the Alaska Native Claims Settlement Act which provided the Secretary of the Interior the opportunity to designate new natural, cultural, recreational, and wildlife areas. Section 17(d)(2) of the act authorized the Secretary to withdraw 80 million acres of land during the next two years to be studied for possible additions to the National Park, National Wildlife Refuge, National Wild and Scenic Rivers, and National Forest System. The deadline for the Secretary's withdrawal action was December 18, 1973. On December 17, 1973, the legislative proposals resulting from these "d-2" studies were submitted to Congress. Following receipt of these proposals, Congress had five years (until December 17, 1978) within which to act. Congress did not so act.

(Continued on following page)

The overall purpose of ANILCA is found in 16 U.S.C. § 1301. ANILCA is aimed at preserving "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" in "certain lands and waters in the State of

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(Continued from previous page)

In order to prevent the withdrawal status of the lands which were included in the proposed legislation from terminating on December 17, 1978, the Secretary, on November 16, 1978, exercised his authority under section 204(e) of the Federal Land Policy and Management Act (FLPMA) to withdraw 105 million acres of federal land in Alaska for a three-year period expiring on November 19, 1981. The Secretary of Agriculture withdrew an additional 11 million acres under section 204(b) of the FLPMA for a two-year period.

On December 1, 1978, the President withdrew by proclamation over 55 million acres of Alaska land and designated them as national monuments to be administered by the National Park Service, the U.S. Fish & Wildlife Service, and the U.S. Forest Service.

The Secretary of the Interior, on February 12, 1980, withdrew 40 million acres of land for a period of 20 years under the authority of the FLPMA to extend the three-year withdrawals that were scheduled to expire in November, 1981.

On December 2, 1980, the Alaska National Interest Lands Conservation Act was signed by the President as Pub. L. No. 96-487. Since then, three public laws have been passed amending the origianl legislation: Pub. L. No. 97-394, Pub. L. 468, and Pub. L. No. 98-620.

The entire legislative history of ANILCA has been assembled by the Bureau of Land Management in 41 volumes entitled "Public Law 96-487, Alaska National Interest Lands Conservation Act". *See* 1980 U.S. Code Cong. & Admin. News (page 5070) for ANILCA's legislative history.

Alaska". 16 U.S.C. § 3101(a). As regards the subsistence way of life for Alaska residents, ANILCA provides:

> It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for *rural residents engaged in a subsistence way of life to continue to do so.*

16 U.S.C. § 3101(c) (emphasis supplied).

Subchapter II of ANILCA, Sections 3111 through 3126, pertains to subsistence management and use of "public lands" in Alaska.[2] Subchapter II contains a statement of congressional policy which reiterates exactly the above-quoted purpose: the preservation and perpetuation of the subsistence lifestyle for "rural residents" of Alaska. 16 U.S.C. § 3112(1). Subchapter II of ANILCA further declares it to be the policy of Congress that "nonwasteful subsistence uses of fish and wildlife . . . shall be the priority consumptive uses of all such resources on the public lands of Alaska. . . ." 16 U.S.C. § 3112(2).

The term "subsistence uses" is defined by ANILCA at 16 U.S.C. § 3113 as:

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[2] The term "public lands" is defined by 16 U.S.C. § 3102(3). With certain exceptions, "public lands" are lands situated in Alaska, the title to which is in the United States after December 2, 1980. 16 U.S.C. § 3102(2) and (3). Since the State of Alaska has title to and manages considerable public land in its own right, "public lands" of the United States are herein referred to as "federal lands".

> [T]he customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

The primary operative provision of ANILCA pertinent to this case is that which provides a "preference for subsistence uses" as follows:

> Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses *shall be accorded priority over* the taking on such lands of fish and wildlife for *other purposes*. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:
>
> (1) customary and direct dependence upon the populations as the mainstay of livelihood;
>
> (2) local residency; and
>
> (3) the availability of alternative resources.

16 U.S.C. § 3114 (emphasis supplied).

Section 3115 of ANILCA sets out the basic federal structure for implementation of section 3114 on federal lands within the State of Alaska. Prior to ANILCA, management of fish and wildlife on federal lands in the State of Alaska had been carried out by the State of Alaska through its Department of Fish and Game. But for the

provision of 16 U.S.C. § 3115(d), under ANILCA management of fish and game on federal lands in the State of Alaska would have been given over to the Secretary of the Department of the Interior. The latter section provides in pertinent part:

> The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from December 2, 1980, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this subchapter for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with this section shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses.

Prior to the enactment of ANILCA, the State of Alaska had commenced its efforts to recognize the subsistence lifestyle and to continue management of fish and wildlife on federal lands under a program permitting subsistence use. The Alaska statute which provided the foundation for the State's subsistence program was put in place by the Alaska Legislature in 1978. Ch. 151 SLA 1978; AS 16.05.251, -.255, -.257, and -.940(23) (1978). The latter act contained a definition of "subsistence uses" which was modeled on the definition of that term contained in draft ANILCA legislation then pending before the United

States House of Representatives.[3] *See* AS 16.05.940(23) (1978).

The Alaska subsistence statute made provision for the adoption of regulations. AS 16.05.251(b) and -.257 (1978). In late 1980, the Board of Fisheries of the State of Alaska made findings and adopted certain policies as regards protection of customary and traditional subsistence fishing. In identifying characteristics associated with subsistence fishing, the Board of Fisheries determined to consider "a use pattern established by an identified community, sub-community, or group having preponderant concentrations of persons showing past use." Plaintiff's Exhibit 10. In conjunction with identifying subsistence characteristics, the Board of fisheries found that: "Customary and Traditional uses continue to be nutritionally, economically, and socially important, particularly in the non-road-connected villages of Cook Inlet." *Id.* Except by this indirect reference to villages off the road network, the board's findings and itemization of characteristics did not expressly deal with the concept of "rural" areas of residents. These criteria ultimately came to be incorporated into the Alaska Administrative Code of Regulations as 5 AAC 01.597 (repealed May 11, 1985).[4]

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[3] S. Rep. No. 96-413, 96th Cong., 2d Sess. 268, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5070, 5212. This legislative history further indicates that the definition of "subsistence uses" which ultimately became section 3113 of ANILCA was adopted from the definition of that term contained in section 15, chapter 151, Session Laws of Alaska (1978).

[4] 5 AAC § 01.597 can be found in *Madison v. Alaska Department of Fish & Game*, 696 P.2d 168, 172 n.8 (Alaska 1985).

Based upon the foregoing, the Board of Fisheries in 1981 authorized a subsistence fishery for Cook Inlet salmon at English Bay, Port Graham, and Tyonek where customary and traditional uses of this resource were found to exist. The Board expressly rejected a subsistence fishery for Plaintiffs. In the early 1980's (it is now otherwise as discussed in a succeeding section of this order), there was no provision for Plaintiffs to employ gill net fishing since this method of taking fish did not qualify as either commercial or sport fishing due to statutory and regulatory characteristics of those modes of fishing. Litigation followed and preliminary injunctions from the court of the State of Alaska resulted in personal use gill net fisheries in the Cook Inlet area. *Madison v. Alaska Department of Fish & Game*, 696 P.2d 168, 173 (Alaska 1985).

In 1982, the Alaska Boards of Fisheries and Game jointly adopted regulations for the protection of subsistence uses. 5 AAC 99.010 (1982). By this regulation, customary and traditional subsistence uses were for the first time expressly associated with "rural Alaska residents" and were to be identified by reference to eight characteristics which plainly have their origins in the ten criteria originally employed by the Board of Fisheries.

In due course, the State of Alaska transmitted to the Department of the Interior its proposed subsistence management and use program for review by the Secretary of the Department of the Interior (hereinafter the "Secretary") under 16 U.S.C. § 3115(d). By letter dated May 14,

1982, the Secretary advised the Governor of the State of Alaska that[5]:

> Based upon our review of [the State's] submission, material transmitted to us by the State on December 2 and 23, 1981, and other relevant information, we have determined that the State's program will be in compliance with Sections 803, 804 and 805 of ANILCA [16 U.S.C. §§ 3113, 3114, and 3115] as of June 2, 1982. As a result of this certification of compliance, the State retains its traditional role in the regulation of fish and wildlife resources on the public lands in Alaska.

Meanwhile, *Madison* was working its way through the courts of Alaska. The *Madison* plaintiffs challenged the board's application of its regulations but were unsuccessful in the superior court. In February of 1985, the Alaska Supreme Court held that under then-operative Alaska statutes, subsistence uses were open to both urban and rural residents alike. *Id.* at 176. The Alaska Supreme Court found that the board's regulations which excluded urban subsistence applicants such as Madison were inconsistent with the intent of the 1978 state subsistence act.

As a consequence of *Madison*, on September 23, 1985, the Secretary advised the Governor of the State of Alaska that[6]:

> [T]he Department of the Interior finds it necessary to advise you formally that the State subsistence program is no longer in compliance with the requirements of ANILCA as specified in Title VIII [16 U.S.C. § 3111, *et seq.*].

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[5] Defendant's Memorandum in Support of Motion to Dismiss, Attachment No. 1.

[6] Defendant's Memorandum in Support of Motion to Dismiss, Attachment No. 2.

Commenting upon *Madison*, the Secretary further advised:

> This ruling held that under the State statute, the subsistence preference must be extended to both "rural" and "urban" subsistence users. Because section 803 [16 U.S.C. § 3113] of ANILCA limits the subsistence preference to "rural Alaska residents," the *Madison* decision raised questions as to the continuing eligibility of the State to manage subsistence on public lands in Alaska under section 805(d) [16 U.S.C. § 3115(d)] of ANILCA.

The letter continues by discussing earlier communications to the State and then goes on to inform the Governor that:

> [T]he absence of legislative action this year to amend the State subsistence statute to conform to ANILCA has confirmed our preliminary determination that the State is no longer in compliance with the requirements of section 805(d) [16 U.S.C. § 3115(d)].
>
> You are hereby advised that the State has until June 1, 1986, to revise its subsistence program to bring it back into compliance with the requirements of sections 803, 804 and 805 [16 U.S.C. §§ 3113, 3114, and 3115(d)] of ANILCA. Compliance will require that the subsistence preference be limited to those rural Alaska residents who customarily and traditionally make use of subsistence resources. If the State has not conformed its subsistence program to the requirements of ANILCA by that date, the Department will be obliged to discharge its obligations pursuant to section 805 [16 U.S.C. § 3115(a) through 3115(c)]. As we noted to the State Boards of Fisheries and Game in 1982, there are various ways to comply with the requirements of section 805; the regime in force when the *Madison* decision was handed down represented one possible approach.

In response to the foregoing, the Alaska Legislature in 1986 adopted new legislation on the subject of subsistence. Ch. 52, SLA 1986. This act effected multiple amendments to Title 16 of the Alaska Statutes which codifies Alaska's fish and game laws. The main operative provision of chapter 52 is codified as AS 16.05.258, which in pertinent part provides:

> (a) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence in each rural area identified by the boards.

AS 16.05.258(c) provides for the adoption of regulations which accord "a preference over other consumptive uses" for subsistence uses of fish stocks. This subsection also sets out the criteria for restricting subsistence uses when necessary to assure sustained yields.

Chapter 52 also embodied a definition of "rural area"[7]:

> "[R]ural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area.

Chapter 52 also contains a definition of "subsistence fishing" and "subsistence uses"[8]:

> "[S]ubsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries

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[7] ¶ 32, § 10, ch. 52, SLA 1986; AS 16.05.940(25).

[8] ¶ 22, § 10, ch. 52, SLA 1986; AS 16.05.940(28), (30).

> resources by a resident domiciled in a rural area of the state for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;
>
> . . . .
>
> "[S]ubsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis. . . .

By letter dated November 7, 1986, the Secretary advised the Governor of Alaska that[9]:

> I am therefore pleased to inform you that we have determined that the State's subsistence program is once again in full compliance with sections 803, 804 and 805 of ANILCA. The State as a result will continue in its traditional role in the regulation and management of subsistence uses of fish and wildlife on the public lands in Alaska.

Motion to Dismiss/Standing

Although the Court has already given full consideration to Plaintiff's motion for preliminary injunction at this point, Defendant's contention that Plaintiff lacks

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[9] Defendant's Notice of Additional Authority, filed November 25, 1986.

standing to raise the substantive questions which are before the Court should logically be ruled upon first. Defendant contends that Plaintiff has not demonstrated through its complaint that an injury has occurred. In support of this contention, Defendant argues at length that: "[e]xtensive hunting and fishing opportunities are available to all residents of the Kenai Peninsula, including the members of Plaintiff Kenaitze Indian Tribe." Defendant's Memorandum in Support of Motion to Dismiss, at 4.

Plaintiff's complaint alleges that the Kenaitze Indian Tribe is made up of members who have resided principally on the Kenai Peninsula of Alaska since before the Russian occupation of Alaska. The Kenaitze people are alleged to have depended upon natural resources such as fish for their livelihood and subsistence. The complaint alleges (and the claim is admitted by Defendant as to some but not all of the Kenaitze people) that the Kenaitze have consistently harvested salmon near their homes, that the knowledge of the means of harvesting, handling, preparing, preserving, and storing salmon has been passed down through the generations, and that harvested salmon continues to be shared among family and tribal members. It is claimed that the Kenaitze are rural Alaskans and that their taking of natural resources from in and around Cook Inlet is for subsistence purposes which are entitled to priority under ANILCA. Complaint, para. XVII. Plaintiff's complaint alleges as its cause of action the refusal of the State of Alaska to recognize the priority to which the Kenaitze members' taking of salmon is allegedly entitled under ANILCA. Complaint, para. XVIII. Plaintiff contends that, to the extent the 1986

Alaska subsistence statute cannot be read to protect Kenaitze members' salmon fishing for subsistence uses, the statute is inconsistent with ANILCA. Complaint, para. XIX.

The general thrust of Defendant's answer is a denial that natural resources used by Kenaitze members today are "subsistence uses" as that term is defined in ANILCA. Answer, para. 10. However, as set out above, the primary thrust of Defendant's standing argument is the assertion that Plaintiff's members are not injured because of the numerous fishing opportunities available to them under Alaska law.

Defendant's argument misses the mark. Plaintiff's complaint alleges that its members are subsistence users of fish stocks, and that as such they are entitled to priority over other consumers of fish. Plaintiff contends that its members have been denied such priority as a result of Defendant's implementation of its subsistence statute. Assuming that Plaintiff is able to establish its foregoing contentions, it members will most certainly have been denied the priority that Congress intended for subsistence users of Kenai Peninsula fish stocks. Defendant's argument misses the thrust of Plaintiff's contention in that all of the opportunities which Plaintiff's members have available to them in common and on an equal footing with other users of fish stocks patently fail to afford Plaintiff's members, if they are subsistence users, "priority over the taking . . . of fish . . . for other purposes." 16 U.S.C. § 3114. Equal access is simply not the same as priority. Denial of the statutory priority, if established, is certainly an injury in fact to Plaintiff's

members. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54 (1970); *Heller v. Bushey*, 759 F.2d 1371, 1373 (9th Cir. 1985).

Additionally, the taking of fish for subsistence purposes by those who have a tradition of such a lifestyle is within the zone of interests protected by ANILCA. *Barlow v. Collins*, 397 U.S. 159, 165-66 (1970). Indeed, the protection of subsistence uses by rural Alaskans is the fundamental purpose of those provisions of ANILCA hereinabove discussed.

It should be pointed out that Plaintiff's standing to sue is not dependent upon any racial or tribal consideration. The Court would have the same view of this matter if Plaintiff were an association of persons of any racial background (or of unknown racial background) whose only common characteristics were residence in a rural part of Alaska and the customary and traditional use of wild renewable resources for food. It is such persons who are entitled to priority access to fish for subsistence uses. 16 U.S.C. §§ 3113 and 3114.

That such an entity as an association of rural subsistence users may sue under ANILCA is expressly recognized wherein that Act provides:

> Local residents and other persons and *organizations* aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 3114 of this title (or with respect to the State as set forth in a State law of general applicability if the State has fulrilled the requirements of section 3115(d) of this title) may- . . . file a civil action in the United States District Court for the District of Alaska to require such

actions to be taken as are necessary to provide for the priority.

16 U.S.C. § 3117(a) (emphasis supplied).

Clearly Plaintiff is such an "organization" allegedly aggrieved by a failure of the state to provide the section 3114 priority for subsistence uses. Defendant's motion to dismiss for lack of standing is denied.

Motion for Preliminary Injunction

The judicial enforcement provisions of ANILCA provide that:

> The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing.

16 U.S.C. § 3117.

A hearing was requested and has been held as regards Plaintiff's motion.

The criteria for considering a motion for preliminary injunction are not here in dispute. The Ninth Circuit Court of Appeals has recently summarized the tests for granting preliminary injunctions as follows:

> The traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). *Sierra Club v. Hathaway*, 579 F.2d 1162, 1167 (9th Cir. 1978). "The moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious

questions are raised and the balance of hardships tips sharply in its favor." *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

Dollar Rent A Car of Washington v. Travelers Indemnity, 774 F.2d 1371, 1374-75 (9th Cir 1985).

The Court applied the foregoing authorities and criteria in considering Plaintiff's motion for preliminary injunction. In so doing, the Court concluded that Plaintiff was not just unlikely to prevail on the merits of its claim but also that the Defendant was entitled to judgment as a matter of law as to the issue briefed and argued by the parties on motion for preliminary injunction. This issue was Plaintiff's contention that the definition of "rural area" contained in the 1986 Alaska subsistence statute was inconsistent with ANILCA. As a consequence, and as explained at the outset, the Court held status conferences with counsel which resulted in an agreement that the Court should proceed with the parties' cross-motions for summary judgment. Accordingly, and because of the Court's reasons and conclusions hereinafter set out as regards the motions for summary judgment, Plaintiff's motion for a preliminary injunction must be denied because, as a matter of law, Defendant is entitled to prevail on the issues raised by the motion for preliminary injunction and cross-motions for summary judgment.

As has been discussed in the Court's previous procedural order of April 16, 1987, the Court and counsel have had discussions concerning the nature and extent of Plaintiff's complaint. Initially, there was some thought on the part of the Court that Plaintiff's complaint challenged only the State subsistence statute and its compatibility

with federal law. Oral argument on the motion for preliminary injunction, and a more thorough analysis of Plaintiff's complaint, as well as the other arguments which counsel have presented in writing, have caused the Court to conclude that Plaintiff's complaint, when liberally construed, is sufficient to comprehend not only the issue of consistency between federal and state subsistence laws, but also the actual application of the State's subsistence program under ch. 52, SLA 1986, and the regulations promulgated under that statute as to Plaintiff's members. The motion for preliminary injunction and the cross-motions for summary judgment address only the former issue. The latter issue involves, among other things, an extremely complex factual situation and, as discussed at the conclusion of this order, presupposes a resolution of the first issue which the Court now takes up.

Cross-Motions for Summary Judgment

By the provisions of section 3115(d) of ANILCA, Congress made provision for a delegation of subsistence management as to federal lands in the State of Alaska. As fully set out above, section 3115(d) authorized the State of Alaska to continue the role which it had enjoyed as manager of fish and game resources in the State of Alaska if:

> [T]he state enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in sections 3113, 3114, and 3115 of this title. . . .

By its motion for summary judgment, Plaintiff does not argue that the Alaska subsistence law fails to provide for the subsistence "preference" required by section 3114 of ANILCA, nor does Plaintiff contend that the State of Alaska has failed to provide for the "participation" required by section 3115(a).[10] Rather, Plaintiff's claim centers upon the definition of subsistence uses. Plaintiff's specific contention on motion for summary judgment (as well as on motion for preliminary injunction) is that the State of Alaska subsistence statute definition of "rural area" is inconsistent with section 3113 of ANILCA. By cross-motion for summary judgment, the State of Alaska urges the appropriateness of its definition of "rural area" under ANILCA.

The parties are in agreement that resolution of the foregoing issue does not involve disputed facts, and that it may be resolved as a legal proposition. The Court has concluded that there are no genuine issues of material fact necessary to resolution of the foregoing issue and that the Defendant is entitled to judgment on this issue as a matter of law. Rule 56(c), Federal Rules of Civil Procedure.

In furtherance of the ANILCA requirement that Alaska law contain a definition consistent with section 3113, the Alaska Legislature adopted AS 16.05.940(30). This definition of "subsistence uses" is set forth at pages 12-13, above. Subsection 30 defines "subsistence uses" to

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[10] Alaska's subsistence law is on its face a law of general application. AS 16.05 applies without qualification to the taking of fish and game throughout the State of Alaska. Plaintiff does not argue otherwise.

mean: "customary and traditional uses of . . . renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption. . . ."

Section 3113 of ANILCA defines "subsistence uses" to mean "the customary and traditional uses by rural Alaska residents of . . . renewable resources. . . ."

The words employed by Congress and by the Alaska Legislature are plain. The two statutes in substance say the same thing. There is no obvious inconsistency of definition between the two statutes.

The term "rural" may itself be lacking in precision. However, this is the term which Congress chose to use. In defining "subsistence uses", the Alaska Legislature employed the same term. The Court does not perceive any meaningful difference between the phrase "rural Alaska residents" and "resident domiciled in a rural area". AS 16.05.940(30) and 16 U.S.C. § 3113. The Court concludes that the Alaska subsistence statute meets the requirement of ANILCA section 3115(d) that it contain a definition of subsistence uses consistent with ANILCA.

However, the specific thrust of Plaintiff's argument is that the Alaska definition of "rural area" (AS 16.05.940(25)) takes the Alaska subsistence law out of compliance – out of consistency – with ANILCA. While it is the Court's view that the congressional requirement of consistency with ANILCA (section 3115(d)) is on its face a term of sufficient breadth to afford the State of Alaska considerable latitude in the fashioning of a subsistence program of general application in Alaska, the Plaintiff's argument cannot be dismissed out of hand for two reasons. Firstly, the issue of subsistence hunting and fishing

rights in Alaska is one of immense importance for the people of the State of Alaska. As is suggested by the lengthy history of this matter, what the Court will decide here impacts not just Plaintiff's members and Defendant, but all subsistence users of fish and game, all sport fishermen and hunters, and many commercial fishermen of the State of Alaska. Secondly, the Court must recognize the theoretical possibility that the State could have defined terms important to subsistence fishing in such a fashion as to substantially deprive the Plaintiff's members of their statutory "priority" under ANILCA, section 3114, despite the facial consistency which exists as between the state and federal subsistence laws insofar as the "definition, preference, and participation" provisions contained in them.

ANILCA does not contain a definition of the term "rural". AS 16.05.940(25) defines "rural area" as:

> "[A] community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area. . . .

In defining "rural area", the State has employed the very same operative terms as the ANILCA definition of "subsistence uses". 16 U.S.C. § 3113. Each makes reference to customary and traditional uses of fish or game for personal or family consumption; each makes reference to non commercial uses of such resources. By so doing, the State has in substance defined "rural area" as those parts of the State of Alaska where subsistence uses are carried on by the people.

While the State's definition of "rural area" may lack some certainty of application in that it cannot be applied directly to a map so as to locate subsistence areas, the Court sees no conflict or inconsistency between AS 16.05.940(25) and section 3113 of ANILCA. Likewise, and because the terms used by the state statute are those used in the federal statute, there is no conflict or inconsistency between the state statute and the congressional policy statement for the subsistence portions of ANILCA contained in 16 U.S.C. § 3112. Here also, Congress has expressed the intent that the subsistence lifestyle be available to "rural residents". 16 U.S.C. § 3112(1).

By section 3116 of ANILCA, Congress has required that:

> The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 3114 of this title and shall advise the State and [specified house and senate committees] annually and at such other times as he deems necessary of his views on the effectiveness of the implementation of this subchapter including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any other recommendations he may have.

As detailed hereinabove, the Secretary, in furtherance of the foregoing and as a result of the Alaska Supreme Court decision in *Madison*, advised the State on September 23, 1985, that "the State subsistence program is no longer in compliance with the requirements of ANILCA. . . ." *See* page 10, above. Subsequently, the State of Alaska amended its fish and game laws so as to restrict the availability of subsistence uses to rural Alaska. The Secretary then advised the Governor of the State of

Alaska that it was "once again in full compliance with . . . ANILCA." *See* page 13, above.

By the foregoing, the Department of the Interior has unequivocally expressed its favorable evaluation of the State's compliance with ANILCA. The Court takes note of the fact that this evaluation was given in the very same context which gives rise to this litigation. The Department of the Interior expressed disapproval of the State's subsistence program when it was ordered expanded to include urban residents of the State by the Alaska Supreme Court. As soon as the Alaska Legislature amended the subsistence statute so as to again restrict its operation to rural Alaska, the Department of the Interior expressed its approval of the State's subsistence program.

Since the Secretary is under a direct congressional mandate to monitor and to advise the State as regards its implementation of the subsistence portions of ANILCA, the Court owes deference to the Secretary's views on this subject. *Kunaknana v. Clark*, No. A83-337 (D. Alaska Dec. 20, 1983), *aff'd*, 742 F.2d 1145 (9th Cir. 1984).[11]

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[11] Agency interpretations of a statute are entitled to great deference and should be upheld so long as they are reasonable. *Western Pioneer, Inc. v. United States*, 709 F.2d 1331, 1335 (9th Cir. 1983); *United States v. Boyden*, 695 F.2d 685, 688 (9th Cir. 1983).

Kunaknana, 742 F.2d at 1150. Particularly pertinent to the issue at hand is the Ninth Circuit's quotation in *Kunaknana* from *Western Pioneer*:

(Continued on following page)

The Secretary's view that the current Alaska subsistence law is consistent with ANILCA reassures this Court that its independent view of the consistency between these two statutes is the correct one.

Because of the absence of a congressional definition of the term "rural", the Court has reviewed the substantial legislative history on the subsistence portions of ANILCA upon which the parties rely and advance extensive argument. Plaintiff argues that rural areas should be defined by reference to numbers of people – population density. Plaintiff urges in this regard that the State of Alaska erred in defining "rural area" in terms of communities or areas of the state where the subsistence lifestyle "is a principal characteristic of the economy." AS 16.05.940(25). The legislative history of ANILCA is particularly helpful in evaluating these arguments of the Plaintiff.

As to Plaintiff's first contention – that the rural nature of an area be defined in terms of its population – there is little or no support in the legislative history. As to the second contention – that rural areas should not be defined in terms of the prevalence of subsistence uses or

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> Our task then, is not to interpret the statutes as we think best, but rather to inquire whether the [agency's] construction was "sufficiently reasonable" to be accepted. "To satisfy the standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." [Citations omitted.]

Kunaknana, 742 F.2d at 1150, *quoting Western Pioneer*, 709 F.2d at 1335.

a characterization of the economy of the area – the legislative history suggests just the opposite.

Both of these matters are best addressed in a single passage which appears in Senate Report No. 96-413, 96th Cong., 2d Sess. 233, *reprinted in* 1980 U.S. Code Cong & Admin. News 5070, 5177, where we read the following:

> Although many residents of cities such as Ketchikan, Juneau, Anchorage, and Fairbanks harvest renewable resources from the public lands for personal or family consumption, *by its very nature a "subsistence use" is something done only by Native and non-Native residents of "rural" Alaska.* The Committee adopted an amendment to clarify this point by limiting application of the definition to areas of "rural" Alaska including communities such as Dillingham, Bethel, Nome, Kotzebue, Barrow, and other Native and non-Native villages scattered throughout the State. However, *the Committee does not intend to imply that the rural nature of such communities is a static condition; the direction of the economic development and rural character of such communities may change over time.* It should be emphasized that this amendment is not intended to impose a "durational" rural residency requirement in the defintion or impede the traditional movement of Alaska residents between the rural areas and the major population centers and vice versa.

(Emphasis supplied.)

The foregoing gives no credence at all to Plaintiff's population argument. While Congress certainly did contrast the cities of Ketchikan, Juneau, Anchorage, and Fairbanks on the one hand, to Dillingham, Bethel, Nome, Kotzebue, and Barrow on the other hand, there is simply no suggestion that either the Secretary or the State of Alaska in implementing the subsistence priority provided

for in ANILCA would be governed by the population of any given area. On the contrary, the quoted language, and in particular the reference to Dillingham, Bethel, Nome, Kotzebue, and Barrow, which were considered by Congress to be part of "rural" Alaska, strongly suggest that the density or sparseness of population was not a primary consideration. In this regard, the Court takes judicial notice of the fact that the last-named cities are the largest, most heavily populated centers of government and commerce in western Alaska. Plainly, Congress had something other than population *per se* in mind by the creation of a dichotomy between Ketchikan, Juneau, Anchorage, and Fairbanks on the one hand, and Dillingham, Bethel, Nome, Kotzebue, and Barrow on the other.

The Court is convinced that what Congress had in mind is precisely what the legislature of the State of Alaska expressed when it defined "rural area". Whereas the State expressed itself in terms of subsistence uses being a "principal characteristic of the economy", Congress, in the above report, expressed the same concept by saying that while Ketchikan, Juneau, Anchorage, and Fairbanks residents harvest renewable resources for personal or family use, "by its very nature" the subsistence lifestyle ("subsistence use") is carried on in other parts of the state, not the larger cities. The Court simply cannot read into any of the foregoing a population concept or requirement for locating or siting subsistence uses of resources.

Moreover, the same above quoted passage from the senate report characterizes rural Alaska in terms of economic considerations. Congress expressly recognizes

that what is presently a rural area may not be such in the future due to "the direction of the economic development . . . [of an area] over time." Thus the economic characterization of subsistence areas employed by the State is quite consistent with legislative history.

Debate before the House of Representatives, and in particular the presentation of Congressman Udall of Arizona, the prime sponsor of what became ANILCA, is of the same tenor on this subject. 125 Cong. Rec. H2692 (daily ed. May 4, 1979) (statement of Rep. Udall). Congressman Udall's presentation gives no comfort whatsoever to Plaintiff's contention that rural areas were to be determined by their population. On the other hand, the congressman's remarks do lend support to the State's view that what was to be fostered and protected by ANILCA was a very special economic system which was at times referred to as a way of life. In particular, the Congressman spoke to the matter of "subsistence uses" as follows:

> Mr. Chairman, the economic life of Alaska's rural villages is grounded on subsistence hunting, fishing, and gathering activities with only limited participation in the urban cash economy.

Id. at H2697.

The Court concludes that Plaintiff is wrong when it contends that population considerations were to be the measure of where subsistence uses would have priority. The Court further concludes that the State of Alaska is correct in its contention that it must provide priority for subsistence uses in those portions of the state where the subsistence way of life is a principal characteristic of the economy.

Conclusion

Plaintiff's motion for a preliminary injunction is denied. Plaintiff's motion for summary judgment is denied. Defendant's cross-motion seeking dismissal of Plaintiff's complaint for lack of standing is denied. Defendant's cross-motion for summary judgment is granted; however, this grant of summary judgment pertains only to the legal issue briefed by the parties, and does not dispose of Plaintiff's complaint. At this stage of the proceedings, the Court has determined only that there is no inconsistency between the Alaska subsistence statutes and ANILCA.

At the last status conference held in this case, Plaintiff requested that in rendering a ruling on the foregoing motions the Court render a final judgment under Rule 54(b), Federal Rules of Civil Procedure. As the Court suggested in its April 15, 1987, order, the Court believed, and now concludes, that this matter is not susceptible to entry of any judgment which could be rendered final by application of Rule 54(b). However, the same result sought by Plaintiff can be achieved by an appropriate finding under 28 U.S.C. § 1292(b). The Court is satisfied that the foregoing order is an appropriate subject for an interlocutory appeal under section 1292(b).

The dispute between the parties over the compatibility of ANILCA and the Alaska subsistence laws is a controlling question of law. Although the Court is convinced of the correctness of its decision, the Court is not prepared to state that there is no room for a difference of opinion on the question presented.

More importantly, the issue of subsistence hunting and fishing rights is one of immense importance for the people of the State of Alaska. As is suggested by the lengthy history of this matter set out hereinabove, what the Court here decides and will in the future decide in this case impacts not just the Plaintiff's members and Defendant, but all subsistence users of fish and game, all sport fishermen and hunters, and many commercial fisherman of the State of Alaska. Therefore, it would be most disruptive if this Court were to proceed to the second phase of the case, only to later have the Court of Appeals determine that ANILCA and the Alaska subsistence laws are not compatible. In addition, the remaining portions of this case will require extensive work by Court and counsel which would be a total waste if the legal predicate herein contained, and on the basis of which the Court proposes to go forward with this litigation, were held to be incorrect. This is not a case where there is any likelihood of multiple appeals of the same issue. The Court is of the view that an interlocutory appeal would materially aid this Court in moving forward to the ultimate termination of this litigation which raises crucial issues as to fish and wildlife management in the State of Alaska.

DATED at Anchorage, Alaska, this 8th day of July, 1987.

/s/ H. Russel Holland
United States District Judge
